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93282-4
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SUPREME COURT OF THE STATE OF WASHINGTON

DONALD R. SWANK, Individually and as Personal Representative
of the ESTATE OF ANDREW F. SWANK, and PATRICIA A. SWANK,

Petitioners,

v.

VALLEY CHRISTIAN SCHOOL, a Washington State Non-Profit
Corporation, JIM PURYEAR, MIKE HEDEN, and DERICK TABISH,
individually, and TIMOTHY F. BURNS, M.D., individually,

Respondents.

BRIEF OF AMICUS CURIAE
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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington Defense Trial Lawyers Association (WDTL), established in 1962, includes more than 750 Washington attorneys engaged in civil defense litigation and trial work. The purpose of WDTL is to promote the highest professional and ethical standards for Washington civil defense attorneys and to serve our members through education, recognition, collegiality, professional development and advocacy. One important way in which WDTL represents its member is through amicus curiae submissions in cases that present issues of statewide concern to Washington civil defense attorneys and their clients.

The appeal in this case implicates applicable concerns for WDTL and for foreign defendants generally, who would benefit from a clear and reliable articulation of law on the often vexing issue of specific personal jurisdiction, particularly in light of recent United States Supreme Court jurisprudence. For the reasons set forth below, WDTL respectfully requests that this Court affirm the Court of Appeals' and the trial court's dismissal of Dr. Burns for lack of personal jurisdiction.

II. STATEMENT OF THE CASE

WDTL generally relies upon the facts set forth in Respondent Dr. Burns' briefing.

III. ARGUMENT

The Court of Appeals concluded that the “dispositive case” on the personal jurisdiction issue presented by the facts of this case is *Lewis by & through Lewis v. Bours*, 119 Wn.2d 667, 673, 835 P.2d 221 (1992). *Swank v. Valley Christian School*, 194 Wn. App. 67, 89, 374 P.3d 245 (2016), *review granted*, 186 Wn.2d 1009, 380 P.3d 498 (2016). In *Lewis*, this Court “align[ed] ourselves with the Illinois Supreme Court” in *Yates v. Muir*, 492 N.E.2d 1267 (Ill. 1986). While the Illinois court did not squarely address the Due Process Clause, it observed “that the conclusion we reach in favor of the defendant is consistent with decisions under the due process clause that residents of one State who travel to another jurisdiction for medical treatment cannot prosecute a malpractice action in their State of residence for injuries arising out of that treatment.” *Lewis*, 119 Wn.2d, at 672 (quoting *Yates, supra* at 1269).

As Dr. Burns’ briefing succinctly lays out, *Lewis* directly controls the court’s jurisdictional analysis here.¹ Dr. Burns’ Response Brief, 15-21. WDTL agrees with Dr. Burns’ analysis and with the Court of Appeals’ holding on this point, and expands upon the constitutional due process

¹ In *Lewis* this court expressly held that a nonresident physician’s alleged malpractice in another state against a Washington State resident, standing alone, does not constitute a tortious act committed in Washington, even when the Washington resident suffers injury upon his or her return to Washington. *Id.* at 673. Accordingly, without more, there can be no personal jurisdiction over such an out of state defendant. *Id.*

constraints addressed in the case law relied upon by the Court of Appeals, governing the inquiry of a forum state's assertion of personal jurisdiction over a nonresident defendant. The 2014 Supreme Court decision in *Walden v. Fiore* offers clear and decisive guidance on the relationship required between a foreign defendant and the forum in order to authorize jurisdiction. *Walden v. Fiore*, ___ U.S. ___, 134 S. Ct. 1115, 188 L. Ed. 2d 12 (2014). Under *Walden*, the focus must be on the defendant's suit-related conduct, and whether that conduct creates a substantial connection with the forum state. *Id.* at 1121. The contacts must be those that the "defendant himself" creates with the forum, rather than connections via the plaintiff or a third party. *Id.* at 1122.

Even in the absence of a controlling case such as *Lewis*, the due process inquiry applied by the unanimous Court in *Walden* makes plain that the exercise of personal jurisdiction over Dr. Burns—or indeed, any similarly situated, nonresident—would offend traditional notions of fair play and substantial justice, and undermine constitutional due process rights. Dr. Burns' connections to the forum state were driven solely by the plaintiff or third parties, not through Dr. Burns' suit-related conduct. The Court should affirm.

A. The Trial Court and Court of Appeals Properly Recognized that the Exercise of Personal Jurisdiction over Dr. Burns Would be Inconsistent with Constitutional Due Process Rights and Clear U.S. Supreme Court Precedent.

Washington's long-arm statute, chapter 4.28 RCW, authorizes the court to exercise jurisdiction over a nonresident defendant to the extent permitted by the due process clause of the United States Constitution. *Shute v. Carnival Cruise Lines*, 113 Wn.2d 763, 766, 783 P.2d 78 (1989). To determine whether the exercise of specific jurisdiction over a foreign corporation will comport with due process, courts apply a three-part test:

(1) that purposeful "minimum contacts" exist between the defendant and the forum state; (2) that the plaintiff's injuries "arise out of or relate to" those minimum contacts; and (3) that the exercise of jurisdiction be reasonable, that is, that jurisdiction be consistent with notions of "fair play and substantial justice."

Grange Ins. Ass'n v. State, 110 Wn.2d 752, 758, 757 P.2d 933 (1988) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472-78, 105 S. Ct. 2174, 85 L. Ed. 2d 528 (1985)).

Federal and state law requires that the defendant must have done some act by which it "purposefully avails itself of the privilege of conducting activities within the forum state, thereby invoking the benefits and protections of its laws." *Walker v. Bonney-Watson Co.*, 64 Wn. App. 27, 34, 823 P.2d 518 (1992) (citing *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S. Ct. 1228, 2 L. Ed. 2d 1283 (1958)). Foreseeability of causing injury in another state is not a "sufficient benchmark" for exercising personal

jurisdiction. *Burger King Corp.*, 471 U.S. at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295, 100 S. Ct. 559, 567, 62 L. Ed. 2d 490 (1980)). “Instead, ‘the foreseeability that is critical to due process analysis ... is that the defendant’s conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.’” *Burger King Corp.*, 471 U.S. at 474. “[I]t is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State.” *Id.* at 474–75. “This ‘purposeful availment’ requirement ensures that a defendant will not be haled into a jurisdiction solely as a result of ... the ‘unilateral activity of another party or a third person.’” *Id.* at 475 (internal citations omitted). “Jurisdiction is proper ‘where the contacts proximately result from actions by the defendant *himself* that create a ‘substantial connection’ with the forum State.” *Id.* (emphasis in original, citation omitted).

Recent U.S. Supreme Court activity in the jurisdiction arena has served to tighten the personal jurisdictional requirements that must be met in order to satisfy due process. Two cases concerned general jurisdiction. *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924, 131 S. Ct. 2846, 180 L. Ed. 2d 796 (2011) (“For an individual, the paradigm forum for the exercise of general jurisdiction is the individual’s

domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home” in the forum State.); *Daimler AG v. Bauman*, ___ U.S. ___, 134 S. Ct. 746, 187 L. Ed. 2d 624 (2014) (re-emphasizing the “at home” requirement for general jurisdiction and rejecting the Ninth Circuit’s approach to agency.)² The third, and most germane case to Dr. Burns’ circumstance, is *Walden v. Fiore*, which expressly addressed the relevant contacts to be assessed when deciding whether the exercise of case-specific jurisdiction comports with due process. 134 S. Ct. at 1121.

1. *Walden v. Fiore* precludes the exercise of specific personal jurisdiction over Dr. Burns.

In *Walden*, the Supreme Court considered whether a police officer whose suit-related conduct occurred in Georgia could be haled into court in Nevada, where his alleged victims suffered injury caused by his conduct. *Id.* at 1119. The defendant officer seized plaintiffs’ property while they were in a Georgia airport. *Id.* After the defendant helped draft a probable cause affidavit supporting the forfeiture of the funds and

² The Swanks make only a passing and undeveloped argument that general personal jurisdiction exists. See Petitioners’ Opening Brief, 47. In a footnote, the Swanks simply allege that Dr. Burns’ contacts with Washington “would also appear to subject him to general jurisdiction in the state.” *Id.* Here, where Dr. Burns is domiciled in Idaho, only sees patients in Idaho, and does not solicit any patients or business in Washington, there is simply no basis to assert general jurisdiction over him. See CP 285-87, 331. The Court of Appeals reached essentially this same conclusion, declining to consider the Swanks’ general jurisdiction argument, where it appeared solely in a footnote and was therefore not meaningfully or adequately briefed. *Swank v. Valley Christian Sch.*, 194 Wn. App. 67, 88, n.6, 374 P.3d 245, 256, n.6 (2016).

forwarded that to prosecutors in Georgia, the plaintiffs filed suit against the officer in federal court in Nevada. *Id.* at 1120. The trial court initially dismissed the case for lack of personal jurisdiction, but the Ninth Circuit applied a so-called “effects test” and reversed the trial court’s dismissal for lack of jurisdiction, finding that the Georgia-based defendant knew the plaintiffs had a residence in Nevada and should have anticipated that the effects of his conduct would be felt there, despite the fact that none of the defendant’s suit-related conduct occurred in Nevada. *Id.* at 1120. The Supreme Court found the Ninth Circuit’s “approach to the ‘minimum contacts’ analysis impermissibly allows a plaintiff’s contacts with the defendant and forum to drive the jurisdictional analysis.” *Id.* at 1124-25. The Court ruled that “a defendant’s relationship with a plaintiff or third party, standing alone, is an insufficient basis for jurisdiction.” *Id.* at 1123. Instead, “[f]or a State to exercise jurisdiction consistent with due process, the defendant’s suit-related conduct must create a substantial connection with the forum State.” *Id.* at 1121.

The Court made clear that “suit-related conduct” is the defendant’s “challenged conduct.” *Walden*, 134 S. Ct. at 1125 (“[The Ninth Circuit’s approach] also obscures the reality that *none of petitioner’s challenged conduct had anything to do with Nevada itself.*”) (emphasis added)). *Walden* thus requires courts to focus on the defendant’s suit-related, or,

“challenged,” conduct, and whether that conduct created a substantial connection with the forum.³

The Swanks seek to establish personal jurisdiction over Dr. Burns, but their only alleged basis for doing so (Dr. Burns’ knowledge that their son played football for a private high school across the border in Washington state) is precisely what the Supreme Court rejected in *Walden*.

a. The “suit-related” or “challenged” conduct consists of the treatment Dr. Burns provided to Drew Swank in Idaho.

The conduct that petitioners challenge is Dr. Burns’ treatment of Drew Swank, and the subsequent medical release he provided, based on the Swanks’ self-reported condition. Petitioners allege that Dr. Burns knew Drew attended high school in Washington and would be playing football there. Yet, there is no serious dispute that all of Dr. Burns’ challenged conduct occurred in Idaho, not Washington.

Dr. Burns treated Drew Swank, himself an Idaho resident, since his birth, solely in Idaho. CP 223. In fact, Idaho was the only place that Dr. Burns saw patients at all; he had not seen patients in Washington State since 1993, some 16 years before the events at issue. CP 258-259; 286;

³ This comports with the Supreme Court’s consistent rejection of “attempts to satisfy the defendant focused ‘minimum contacts’ inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State.” *Id.* at 1122 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S. Ct. 1868, 80 L. Ed. 2d 404 (1984)).

331. Dr. Burns' examination of Drew following the concussion that gave rise to these events, occurred in Dr. Burns' Idaho office on September 22, 2009. CP 3. He advised the Swanks that Drew should not return to football until his self-reported symptoms had resolved. CP 374. When the Swanks reported that the symptoms had resolved, Dr. Burns' wrote a note releasing Drew to return to football and left that note at his office in Idaho. CP 320-21. Mrs. Swank picked up the note, gave it to Mr. Swank, and Mr. Swank in turn delivered it to the school in Washington. CP 174.

The Swanks set forth facts they allege establish Dr. Burns' contacts with Washington, and allege further that those contacts are sufficient to support the exercise of personal jurisdiction here. Petitioners' Opening Brief, 16-19; 47-50. But, as Respondent Burns points out, those contacts deal primarily with Dr. Burns' employer, Ironwood. Dr. Burns Response Brief, 30. The Swanks have not sued Ironwood, only Dr. Burns in his individual capacity. *Id.* Under *Walden* the various alleged contacts between Dr. Burns and Washington are irrelevant, insofar as they are not suit-related. For example, Petitioners allege that Dr. Burns would sometimes send prescriptions for patients to pharmacies in Washington; send appointment reminders or place reminder phone-calls to patients in Washington; use labs based in Washington; maintain a website accessible and hosted in Washington; and others. Petitioners' Opening Brief, 16-19.

But these acts are not Dr. Burns' challenged conduct—that is, they do not include Dr. Burns' allegedly negligent treatment of Drew Swank, nor are they Dr. Burns' release for Drew to play football. Because those contacts are not Dr. Burns' suit-related conduct, they are not relevant to the key jurisdictional question, i.e., whether Dr. Burns' *suit-related* conduct created a substantial relationship between Dr. Burns and Washington state.

b. Dr. Burns' Suit-Related Conduct Did Not Create a Connection to Washington, Let Alone the "Substantial" Connection that Due Process Requires.

Petitioners argue that Dr. Burns knew, or should have known, that Drew would go on to play football in Washington after being medically released. They contend that Dr. Burns' knowledge alone somehow creates the substantial connection required under the due process analysis. Supplemental Brief of Petitioners, 15-16. Dr. Burns contests whether such knowledge is established under the facts,⁴ but even assuming that he did know, or that he should have known Drew would be returning to play football in Washington, under the *Walden* test such knowledge is insufficient for the exercise of personal jurisdiction. "A defendant's mere knowledge that a plaintiff will suffer negative effects in a given forum is insufficient to support jurisdiction; the defendant's intentional contacts

⁴ Dr. Burns testified that at the time of the exam he was not aware what school Drew attended or where it was. CP 317-18.

must connect it with the forum state.” *Ruhe v. Bowen*, 2:15-CV-03792-DCN, 2016 WL 5372555, at *4 (D.S.C. Sept. 26, 2016) (citing *Walden v. Fiore*, 134 S. Ct. at 1126 (“[T]he mere fact that his conduct affected plaintiffs with connection to the forum State does not suffice to authorize jurisdiction.”)).

Even before *Walden*, though, mere foreseeability of causing injury in another state has not been a “sufficient benchmark” for exercising personal jurisdiction. *Burger King Corp.*, 471 U.S. at 474 (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. at 295). Instead, the defendant must have taken some act to purposefully avail himself of the privilege of conducting activities within the forum State. *Id.* at 474–75. Dr. Burns’ mere knowledge that Drew would potentially return to play football in Washington is not a purposeful availment by Dr. Burns of the privilege of conducting activities in Washington. The only connection between Dr. Burns’ suit-related conduct and Washington is supplied by Drew Swank, an Idaho resident who, presumably along with his parents, made the decision to attend school and play football in Washington, subsequently suffering his fatal injuries there. Dr. Burns did not draft the medical release in order to access any rights or privileges in Washington; he did so simply as part of his care for Drew, which occurred solely in Idaho. Drew’s team could have traveled to play a game anywhere – Idaho,

Montana, or Oregon. Drew could have played and not suffered injury, or suffered injury without playing. The fact that Drew suffered his tragic injuries at a game in Washington has nothing to do with any of Dr. Burn's challenged conduct. Consequently, Dr. Burn's suit-related conduct did not create a connection with Washington, much less a substantial one; the Washington connection was made by Drew Swank and his parents.

Under *Walden*, it is only the *defendant's* contacts with the forum that may support specific personal jurisdiction, and the Supreme Court has rejected "attempts to satisfy the defendant focused 'minimum contacts' inquiry by demonstrating contacts between the plaintiff (or third parties) and the forum State." *Id.* at 1122 (citing *Helicopteros*, 466 U.S. at 417). Here, petitioners attempt to do precisely that which the Supreme Court has rejected, relying on contacts with Washington that were driven by the Swanks, or the school, not Dr. Burns.

2. *Walden's* principles apply in the medical malpractice and common law negligence contexts.

Walden is an intentional tort case, but it addresses principles of specific jurisdiction that the Court characterizes as applicable to all specific personal jurisdiction cases. *Id.* at 1123. Indeed, subsequent cases to consider the issue consistently demonstrate that *Walden's* focus on "whether the defendant's actions connect him to the forum...[,]" *Id.* at 1124, is applied in a wide variety of litigation settings, including common

law negligence and medical malpractice. *See, e.g., Green v. United States*, 14-CV-119-NJR-DGW, 2016 WL 6248281 (S.D. Ill. Oct. 26, 2016) (medical malpractice); *Ruhe v. Bowen*, 2:15-CV-03792-DCN, 2016 WL 5372555 (D.S.C. Sept. 26, 2016) (medical malpractice); *Sutcliffe v. Honeywell Int'l, Inc.*, CV-13-01029-PHX-PGR, 2015 WL 1442773 (D. Ariz. Mar. 30, 2015) (negligence); *Waggaman v. Arauzo*, 117 A.D.3d 724, 726, 985 N.Y.S.2d 281 (N.Y. App. Div. 2014) (medical malpractice).⁵

In each of these cases, the courts applied the reasoning and holding in *Walden*, and have gone on to recognize a lack of personal jurisdiction. For example, in *Ruhe v. Bowen*, 2016 WL 5372555, plaintiffs alleged personal jurisdiction in South Carolina over a non-resident physician who treated the plaintiff in Colorado, but issued prescriptions electronically to pharmacies in South Carolina. *Id.* at *1. The Court looked explicitly to *Walden*, finding that the doctor's knowledge of potential negative effects in the forum state were insufficient to support jurisdiction, and did not amount to purposeful contacts between the doctor and the forum state. *Id.* at *4. The Court was also persuaded by reasoning that medical services

⁵ Lower courts are applying *Walden* in various types of litigation. *Monkton Ins. Servs., Ltd. v. Ritter*, 768 F.3d 429, 434 n.2 (5th Cir. 2014) (breach of contract); *Presby Patent Trust v. Infiltrator Sys., Inc.*, 14-CV-542-JL, 2015 WL 3506517, at *3 (D.N.H. June 3, 2015) (patent infringement); *Pub. Impact, LLC v. Boston Consulting Grp., Inc.*, 117 F. Supp. 3d 732, 742 (M.D.N.C. 2015) (trademark infringement); *Tackett v. Duncan*, 376 Mont. 348, 334 P.3d 920 (2014) (tort).

are not directed to any particular place, but to the patient himself. *Id.* at *5 (citing *Gelineau v. New York Univ. Hosp.*, 375 F. Supp. 661 (D.N.J. 1974)). Under that reasoning, it would be fundamentally unfair to permit suit against a physician in whatever jurisdiction the patient may travel to and suffer the consequences of treatment. *Id.* “It was [plaintiff]’s, not Dr. Bowen’s, actions that brought Dr. Bowen into contact with South Carolina—had [plaintiff] not moved to South Carolina, Dr. Bowen would have no reason to be in contact with South Carolina.” *Id.* Here, Dr. Burns’ alleged knowledge that Drew would return to play football in Washington is analogous to Dr. Bowen’s knowledge that, by filling prescriptions in South Carolina, some harm may follow his patient there. But mere knowledge that a patient would or might travel to another jurisdiction and suffer consequences there does not amount to the physician purposefully directing his suit-related conduct at the jurisdiction; any connection formed was through the action of the patient himself.

In another analogous and instructive case, *Waggaman v. Arauzo*, the New York plaintiff filed medical malpractice claims in New York, alleging personal jurisdiction over a non-resident physician who was licensed in Texas and provided the challenged treatment in Texas and Florida. 117 A.D.3d at 725. The court applied *Walden*, noting that it served to refine Supreme Court’s “minimum contacts” analysis. *Id.* at 726.

The court concluded that treatment provided to a New York resident outside the forum was exactly the type of attenuated connection to a forum state that the Supreme Court holds violates due process, because the connection to New York is driven by the plaintiff, not by the defendant's conduct. *Id.*

Similarly, in *Green v. United States*, the court ruled against specific personal jurisdiction over a doctor, finding that the doctor did not purposefully direct his activities to the forum. 2016 WL 6248281, at *3. Concluding that an injured patient's residence in the forum cannot support the exercise of jurisdiction over the doctor, the court dismissed the action for lack of personal jurisdiction. *Id.*

These cases collectively illustrate that the analysis set out in *Walden*, and its focus on the defendant's suit-related conduct as the proper basis for conducting the minimum contacts analysis, is appropriately and readily applicable in contexts like the one at issue here. Unlike those cases, though, here the plaintiffs and the doctor are all residents of Idaho; Washington is simply the location where Drew Swank sustained his injuries following issuance of the medical release. Thus, to find jurisdiction, a court would have to ignore both *Walden* and *Lewis v. Bours*, and conclude that an Idaho doctor who treated a long-standing Idaho resident patient can be subject to jurisdiction in Washington simply

because his patient voluntarily traveled to Washington and suffered injury here allegedly as a result of the doctor's negligence.

3. The Lystedt Law does not alter defendants' due process rights nor impact the personal jurisdiction analysis.

Finally, petitioners argue that Washington's passage of the Lystedt Law should support an independent implied cause of action. Petitioners suggest this law therefore imposes additional duties on Dr. Burns, or that it impacts and broadens the court's jurisdictional analysis, creating a condition that would satisfy the exercise of due process here. Petitioners' Opening Brief, 35-39, 46; Petitioners' Supplemental Brief, 15-16. In short, petitioners contend that the Lystedt Law is an articulation by the legislature of an important safety concern, and that Dr. Burns' treatment of Drew Swank with knowledge he would return to Washington to play football here, amounts to a tacit agreement by Dr. Swank to be bound by the Lystedt Law.

WDTL agrees with Dr. Burns' analysis that the Lystedt Law does not create any implied cause of action. Supplemental Brief of Dr. Burns, 12-17. Beyond that, however, there is nothing in the act that should or can change the constitutional due process analysis for the exercise of case specific personal jurisdiction. Since 1993, Dr. Burns had practiced medicine solely in Idaho. CP 258-59. He was licensed only in Idaho, and only saw patients in Idaho. CP 286; 331. While Dr. Burns had once held a

Washington medical license, he let that license lapse in 2003, more than six years before the events in question (and long before the Lystedt Law was passed). CP 253. The Lystedt Law did not have an analog in Idaho at that time.⁶

Under petitioner's proposed argument, a physician would be required to assume he was subjecting himself to the laws—and subsequently to the expectation of being haled into court—anywhere that his patients might subsequently travel. This approach is contrary to controlling Washington and Supreme Court precedent. Moreover, contrary to *Walden* and prior Supreme Court decisions, it would render an out-of-state physician subject to jurisdiction in other states based upon the conduct of third parties: the patient who traveled to the other state, and the legislatures of other states who pass laws regarding how certain types of injuries are to be addressed within their borders. *Walden*, 134 S. Ct. at 1122; *Helicopteros*, 466 U.S. at 417.⁷

⁶ Idaho's law relating to head injuries and concussions sustained by youth athletes was passed in 2012 and is found in Idaho Code § 33-1625.

⁷ Although WDTL acknowledges that none of the parties have argued under the Commerce Clause, U.S. Const. art. I, § 8, cl. 3, against the exportation of the Lystedt Law to physicians practicing in Idaho, it nevertheless bears mentioning that even if Washington's legislature intended the Lystedt Law to somehow govern the conduct of physicians practicing medicine in other states, "[n]o state has the authority to tell other polities what laws they must enact or how affairs must be conducted outside its borders." *Nat'l Solid Wastes Mgmt. Ass'n v. Meyer*, 165 F.3d 1151, 1153 (7th Cir. 1999) (citing *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 571, 116 S. Ct. 1589, 134 L. Ed. 2d 809 (1996); *Healy v. Beer Institute, Inc.*, 491 U.S. 324, 109 S. Ct. 2491, 105 L. Ed. 2d 275 (1989); *Great Atlantic & Pacific Tea Co. v. Cottrell*, 424 U.S. 366,

IV. CONCLUSION

The petitioners' attempt to establish personal jurisdiction over Dr. Burns runs counter to the personal jurisdiction analysis set forth in *Walden* and its progeny, as well as to prior controlling Washington case law. Dr. Burns' challenged conduct—the treatment and eventual release of Drew Swank to return to football—occurred entirely in Idaho. Even assuming Dr. Burns knew that Drew planned to return to play in Washington and could be injured there, such knowledge is insufficient to establish personal jurisdiction under the reasoning in *Walden*. The assertion of personal jurisdiction in this case would violate Dr. Burns' due process rights and break with established federal law. The trial court and the Court of Appeals properly recognized and upheld the lack of personal jurisdiction in this case, and this court should affirm.

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379-80, 96 S. Ct. 923, 47 L. Ed. 2d 55 (1976); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 55 S. Ct. 497, 79 L. Ed. 1032 (1935)). Furthermore, “the ‘Commerce Clause ... precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State[]’” *Healy v. Beer Inst., Inc.*, 491 U.S. 324, 336–37, 109 S. Ct. 2491, 2499–500, 105 L. Ed. 2d 275 (1989) (citing cases). The notion that the Washington legislature has authority to regulate the conduct of an Idaho physician delivering medical treatment in Idaho to Idaho residents is one that this Court should approach with considerable caution. Furthermore, it hardly makes sense that the Washington legislature would imply a cause of action against an Idaho physician under a Washington law that cannot permissibly govern the Idaho physician's conduct in the first place.

Respectfully submitted this 16th day of December, 2016.

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Attorneys for Amicus Curiae Washington Defense Trial Lawyers

DECLARATION OF SERVICE

The undersigned does hereby declare and state as follows:

On the date set forth below, I caused to be served:

- **BRIEF OF AMICUS CURIAE WASHINGTON DEFENSE TRIAL LAWYERS**

in the within matter by arranging for a copy to be delivered on the interested parties in said action, in the manner described below, addressed as follows:

Patrick J. Cronin Winston Cashatt 601 W. Riverside Ave., Ste. 1900 Spokane, WA 99201 (Email pjc@winstoncashatt.com) Attorney for Respondent Jim Puryear	<input type="checkbox"/> VIA FACSIMILE <input type="checkbox"/> VIA U.S. MAIL <input checked="" type="checkbox"/> VIA E-MAIL <input type="checkbox"/> VIA HAND DELIVERY
Gregory M. Miller Melissa J. Cunningham (Email cunningham@carneylaw.com) Carney Badley Spellman, P.S. 701 Fifth Ave., Ste. 3600 Seattle, WA 98104-7010 (Email miller@carneylaw.com) Attorneys for Respondent Timothy F. Burns, M.D.	<input type="checkbox"/> VIA FACSIMILE <input type="checkbox"/> VIA U.S. MAIL <input checked="" type="checkbox"/> VIA E-MAIL <input type="checkbox"/> VIA HAND DELIVERY
William C. Schroeder Gerald Kobluk KSB Litigation, P.S. 221 N. Wall, Ste. 210 Spokane, WA 99201 (Email WCS@ksblit.legal) (Email gkobluk@ksblit.legal) Attorney for Respondent Valley Christian School	<input type="checkbox"/> VIA FACSIMILE <input type="checkbox"/> VIA U.S. MAIL <input checked="" type="checkbox"/> VIA E-MAIL <input type="checkbox"/> VIA HAND DELIVERY

<p>Edward J. Bruya Eric R. Byrd Bruya & Associates, P.C. 601 W. Riverside, Ste. 1600 Spokane, WA 99201 (E-mail ed@bruyalawfirm.com) (E-mail eric@bruyalawfirm.com) Attorney for Respondent Timothy F. Burns, M.D.</p>	<p>_____ VIA FACSIMILE _____ VIA U.S. MAIL x _____ VIA E-MAIL _____ VIA HAND DELIVERY</p>
<p>Steven R. Stocker Stocker, Smith, Luciani & Staub 312 W. Sprague Ave. Spokane, WA 99201 (E-mail sstocker@sslslawfirm.com) Attorney for Respondent Jim Puryear</p>	<p>_____ VIA FACSIMILE _____ VIA U.S. MAIL x _____ VIA E-MAIL _____ VIA HAND DELIVERY</p>
<p>Mark D. Kamitomo Collin M. Harper The Markam Group, Inc., P.S. 421 W. Riverside, Suite 1060 Spokane, WA 99201 Attorney for Petitioners</p>	<p>_____ VIA FACSIMILE _____ VIA U.S. MAIL x _____ VIA E-MAIL _____ VIA HAND DELIVERY</p>
<p>George M. Ahrend Ahrend Law Firm PLLC 100 E. Broadway Ave. Moses Lake, WA 98837 Attorney for Petitioners</p>	<p>_____ VIA FACSIMILE _____ VIA U.S. MAIL x _____ VIA E-MAIL _____ VIA HAND DELIVERY</p>
<p>Valerie McOmie Amicus Co-Coordinator WSAJ Foundation Tel. (360) 852-3332 valeriemcomie@gmail.com</p>	<p>_____ VIA FACSIMILE _____ VIA U.S. MAIL x _____ VIA E-MAIL _____ VIA HAND DELIVERY</p>

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed on December 16, 2016 at Seattle, Washington.

/s/ Stewart A. Estes
Stewart A. Estes

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From: OFFICE RECEPTIONIST, CLERK
Sent: Friday, December 16, 2016 4:05 PM
To: 'Stewart A. Estes'
Cc: 'Valerie McOmie (valeriemcomie@gmail.com)'; 'danhuntington@richter-wimberley.com'; 'Bryan Harnetiaux'; 'collin@markamgrp.com'; 'mark@markamgrp.com'; 'Miller, Greg'; 'George Ahrend'; 'sstocker@ssslawfirm.com'; 'pjc@winstoncashatt.com'; 'wcs@ksblit.legal'; 'ed@bruyalawfirm.com'; 'Chris Nicoll'; 'Melissa O'Loughlin White'; 'Norgaard, Cathy'; 'Ed Bruya'; 'Cunningham, Melissa J.'; 'gkobluk@ksblit.legal'
Subject: RE: Swank v. Burns, et al. - WSC No. 93282-4

Mr. Estes:

We corrected the case number from 90733-1 to 93282-4 on the Brief of Amicus Curiae and the Appendix to Brief of Amicus Curiae by writing it in on the documents. We will let you know if we need corrected pages sent.

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From: Stewart A. Estes [mailto:sestes@kbmlawyers.com]

Sent: Friday, December 16, 2016 3:22 PM

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Subject: RE: Swank v. Burns, et al. - WSC No. 93282-4

Dear Clerk:

I apologize for the confusion.

A number of the briefs filed earlier use No. 90733-1. But, the BRIEF OF RESPONDENTS VALLEY CHRISTIAN SCHOOL AND DERICK T ABISH, filed May 8, 2015 appears to change the cause number to 93282-4 (see cover page).

[http://www.courts.wa.gov/content/Briefs/A08/932824%20COA%20-%20Resp%20Brief%20\(Valley%20Christian%20and%20Tabish\).pdf#search=swank](http://www.courts.wa.gov/content/Briefs/A08/932824%20COA%20-%20Resp%20Brief%20(Valley%20Christian%20and%20Tabish).pdf#search=swank)

We updated the reference line in this email, but not on the brief. Should we file a corrected brief using 93282-4?

Thanks, Stew

From: OFFICE RECEPTIONIST, CLERK [<mailto:SUPREME@COURTS.WA.GOV>]

Sent: Friday, December 16, 2016 2:59 PM

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Subject: RE: Swank v. Burns, et al. - WSC No. 93282-4

We noticed the e-mail reference says case number 93282-4 but the Brief of Amicus Curiae, Washington Defense Trial Lawyers says No. 90733-1. Please advise.

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From: OFFICE RECEPTIONIST, CLERK

Sent: Friday, December 16, 2016 2:53 PM

To: 'Stewart A. Estes' <sestes@kbmlawyers.com>

Cc: Valerie McOmie (valeriemcomie@gmail.com) <valeriemcomie@gmail.com>; danhuntington@richter-wimberley.com; Bryan Harnetiaux <bryanpharnetiauxwsba@gmail.com>; collin@markamgrp.com; mark@markamgrp.com; Miller, Greg <miller@carneylaw.com>; George Ahrend <gahrend@ahrendlaw.com>; sstocker@sslslawfirm.com; pjc@winstoncashatt.com; wcs@ksblit.legal; ed@bruyalawfirm.com; Chris Nicoll

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Subject: RE: Swank v. Burns, et al. - WSC No. 93282-4

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Subject: Swank v. Burns, et al. - WSC No. 93282-4

Dear Ms. Carlson:

Pursuant to the Court's prior permission, please find attached WDTL's *Amicus Curiae Brief and Appendix* in the above matter.

I am hereby contemporaneously serving electronically, by copy of this message, counsel for the parties, and to the Washington State Association for Justice Foundation who by agreement have accepted this method of service.

Thank you,

Stew
Chair, WDTL Amicus Committee

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